STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2009
v	No. 285487 Saginaw Circuit Court
EDWARD JOHN MESMAN, JR., Defendant-Appellant.	LC No. 05-026272-FC

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree premeditated murder, MCL 750.316(1)(a); MCL 750.157a, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carjacking, MCL 750.529a(1), conspiracy to commit carjacking, MCL 750.529a(1); MCL 750.157a, conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was initially sentenced, as a second habitual offender, MCL 769.10, to mandatory life imprisonment for the first-degree premeditated murder conviction, life imprisonment for the conspiracy to commit first-degree premeditated murder conviction, two years' imprisonment for each of the three felony-firearm convictions, 23 to 40 months' imprisonment for the carjacking conviction, 23 to 40 months' imprisonment for the conspiracy to commit carjacking conviction, 23 to 40 months' imprisonment for the conspiracy to commit armed robbery conviction, and 36 to 90 months' imprisonment for the CCW conviction. Defendant was subsequently resentenced to 23 to 40 years' imprisonment each on the carjacking, conspiracy to commit carjacking and conspiracy to commit armed robbery convictions. The remainder of defendant's sentences remained unchanged. We affirm.

Defendant first contends that the trial court erroneously denied his motions to exclude the inculpatory statements made by defendant during the police interviews conducted on December 1, 2004, and December 2, 2004. We disagree. The issue of whether a defendant voluntarily made an inculpatory statement is reviewed by this Court de novo. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). However, a trial court's ruling with respect to a motion to suppress a confession is entitled to deference. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). The trial court's factual findings will be reversed only where they are clearly erroneous. *Tierney, supra* at 708. A factual finding is clearly erroneous where this Court is left

"with a definite and firm conviction that a mistake was made. *Id*., quoting *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003).

The United States Supreme Court has held that the Fifth and Fourteenth Amendments of the United States Constitution protect an accused's privilege against self-incrimination to the extent that the accused enjoys the rights to remain silent and to representation of counsel during a custodial interrogation. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Conversely, statements made by an accused during a custodial interview are admissible when the accused has voluntarily, knowingly, and intelligently waived his rights to silence and to counsel. *People v Bender*, 452 Mich 594, 602-603; 551 NW2d 71 (1996). In addition, the assertion of a right to counsel must be unequivocal. *Tierney*, *supra* at 711. A court considers the totality of the circumstances when determining whether a statement was freely and voluntarily made. *Shipley, supra* at 374 (citation omitted).

During defendant's custodial interview with Michigan State Police Investigators Gary Thomas and Stephen Sipes, the following exchange occurred:

> *DEFENDANT:* I think, I know, I know pretty much I need a lawyer now.
>
> * * *
>
> *SIPES:* You saying you don't want to talk to us anymore?
>
> *DEFENDANT:* I'm not saying that!
>
> *THOMAS:* Okay.
>
> *DEFENDANT:* But, I mean, I know I need a lawyer now. I'm getting blamed for something I didn't do, I mean, I can't, I ain't got the guts to shoot nobody. That's for damn sure.
>
> * * *
>
> *SIPES:* Hey, John, um, just a minute ago you said you needed a lawyer. Then ya said you didn't want to talk to a lawyer so . . .
>
> *DEFENDANT:* I mean, no, I . . .
>
> * * *
>
> *DEFENDANT:* I said I needed a lawyer, I mean, if I'm getting blamed for something. I said I'm gonna need a lawyer but I'd still talk to ya.
>
> *SIPES:* Yer, yer not telling us right now that you don't want to talk to us anymore?
>
> *DEFENDANT:* No. I didn't say that.

SIPES: Okay. Okay because if that's the case then, you know, we'll, we'll be done . . .

DEFENDANT: Well I'll . . .

SIPES: . . . and we'll leave and we won't ask any more questions but you're saying you want, ya think ya need a lawyer but you want to continue talking to us.

DEFENDANT: I will . . .

According to defendant, this exchange demonstrates that he made an unambiguous request for counsel and clearly indicated to the officers that the interview could continue once he obtained the advice of counsel. However, reasonable persons could also interpret defendant's statements as indicating that he would seek the advice of counsel in the future, but was willing to continue the interview.

Our Supreme Court has defined the term "ambiguous" to mean being "equally susceptible to more than a single meaning." *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). While defendant's statements regarding his need for legal representation can reasonably be interpreted as a present demand for counsel, they are also equally susceptible to the interpretation by the trial court that although defendant indicated the need to procure a lawyer in the future, he was willing to continue the interview. Moreover, following the statements to the officers regarding his need for an attorney, there is no indication that defendant refused to answer further questions until provided an opportunity to consult with an attorney. Accordingly, the trial court did not clearly err when it determined that defendant failed to unambiguously assert his right to counsel. *Tierney, supra* at 708.

Defendant admits that his request for an attorney during a subsequent interview with polygraph operator James Coots was equivocal. However, defendant contends that because his initial request for an attorney during the custodial interview was unequivocal, the inculpatory statements made to Coots should have been excluded as "fruit of the poisonous tree." Because we conclude that defendant failed to unequivocally assert his right to counsel during his initial interview, defendant's argument that the trial court improperly denied his motion to suppress lacks merit.

We further conclude that, under the totality of the circumstances, the trial court properly denied defendant's second motion to suppress his inculpatory statements. Relying on testimony during the *Walker*[1] hearing that the polygraph examination was not administered because defendant indicated he was tired and had not eaten, defendant alleges he could not voluntarily waive his rights to remain silent and for counsel because of the deprivation of food and sleep. However, the polygraph examiner also testified that he meticulously explained to defendant his rights and that he appeared to comprehend the explanation. After the examiner specifically inquired if defendant was too tired to participate in the pre-test interview, defendant responded

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

that he felt fine and demonstrated absolutely no reluctance to continue the interview process. Further, additional testimony was elicited that inmates are permitted to sleep at any time and are routinely provided meals three times a day. Although defendant may have deprived himself of sleep and food, "as the Fifth Amendment privilege speaks only of compulsion, 'it is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."' *People v Wyngaard*, 462 Mich 659, 672; 614 NW2d 143 (2000), quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986). Because nothing in the record suggests that defendant's inculpatory statements were the result of improper police conduct, the trial court correctly denied defendant's second motion to suppress his inculpatory statements.

Defendant next asserts that resentencing was improper. We disagree. At defendant's initial sentencing, the trial court imposed sentences of 23 to 40 *months*' imprisonment for each of his carjacking, conspiracy to commit carjacking, and conspiracy to commit armed robbery convictions. Defendant admits that the trial court intended to impose sentences of 23 to 40 *years*' imprisonment for each of these convictions. Ordinarily, in order to preserve a sentencing error for review, a defendant is required to raise an objection at the sentencing hearing. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). In this instance, defendant acquiesced in the action taken by the trial court at the sentencing clarification hearing. Our Supreme Court has held that, "one who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (defining "waiver" as "the intentional relinquishment or abandonment of a known right."). Because defendant waived his challenge to the trial court's action, we decline to address this issue on appeal. *Id.*

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly